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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. NATHAN RAND HILLMAN, Defendant and Appellant.	A141754 (Solano County Super. Ct. Nos. FCR279712 and FCR297248)

Appellant Nathan Rand Hillman appeals from a judgment entered after a jury convicted him of felonies that included two counts of cultivating marijuana and one count of possessing marijuana for sale. (Health & Saf. Code, §§ 11358, 11359.)[1] At his trial, appellant did not deny cultivating or possessing marijuana, but he argued those activities were protected under the Compassionate Use Act (CUA; § 11362.5) and the Medical Marijuana Program Act (MMPA; § 11362.7 et seq.). In this appeal, appellant argues that his convictions for cultivation and possession for sale must be reversed because the evidence at trial established a defense under the CUA and the MMPA, and because a jury instruction on the subject misstated the legal standard and burden of proof applicable to these defenses. We affirm.

[1] Further statutory references are to the Health and Safety Code unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY

A. *Arrest on September 29, 2010*

On the evening of September 29, 2010, Vacaville Police Department officers were executing a search warrant at Parkgreen Drive in Dixon, California. The target of the warrant was Daniel Kittell, who lived in the house. Sergeant Van Gorden noticed appellant walking empty-handed to a white van parked at the address, and approached him to ask for identification and ascertain why he was at the house. Appellant, who smelled of marijuana, explained he was there to visit a friend and drop off a weight bench. He admitted he had been smoking marijuana inside the house and said he had marijuana in his van. Appellant was carrying $1,500 in $100 bills and a cell phone in his right rear pants pocket.

Police searched the van and found a cooler between the two front seats, inside of which were two gallon-sized zip-top plastic bags that each contained about 124 grams of marijuana. Under the cooler was another zip-top bag containing about 124 grams of marijuana. A black plastic bag in the dash cargo area of the van contained over 140 grams of marijuana. Inside a pocket area of the driver's side door, officers found a napkin knotted around a plastic bag containing 3.35 grams of cocaine. Under the radio was $725 in cash and notebooks containing what appeared to be "pay-owe" sheets (ledgers keeping track of drug transactions). A loose piece of paper included the words "Vacaville, Dixon, and Fairfield," and underneath "Dixon" was written "trade to Danny, from Danny" and "bench." Near the word "bench" was written "$1500" and "750." In the cargo area of the van were plastic containers of chemicals and nutrients associated with the cultivation of marijuana.

Detective Tan (who knew appellant) spoke with Kittell, and Kittell acknowledged he had smoked marijuana with appellant that evening. Kittell said appellant had supplied the marijuana because he wanted Kittell to try a sample of marijuana appellant had for sale. At trial, however, Kittell testified that he only "threw [appellant] under the bus" because he thought Tan would allow him to go free.

The ring holding the keys to appellant's van also held a key to a unit in a self-storage facility on Callen Street in Vacaville. Police obtained a warrant and searched the unit, where they found three separate marijuana growing areas with a total of 160 plants, in addition to a ventilation/exhaust system, fans, timers, grow lights, light ballasts, tools, nutrients and an irrigation system. Officers found several doctors' recommendations for medical marijuana, including one in appellant's name.

Police also obtained a warrant to search appellant's home on Vail Court in Vacaville, where they found 23 marijuana plants being cultivated in one bedroom and another 56 plants being cultivated in an outside shed. Both areas had fans, timers, an irrigation system, grow lights and light ballasts. On a shelf in the garage was a bag containing about 97 grams of dried marijuana near a scale with marijuana residue. Police found $497 in a box inside a dresser drawer in the master bedroom, another $600 in the bedroom closet, a small box in the living room containing 4.5 grams of dried marijuana, and a small notebook that appeared to be a pay-owe sheet. Utility bills in appellant's name included a Pacific Gas and Electric (PG&E) bill for the storage unit on Callen Street and a water bill for an address on Scottsdale Drive in Vacaville. Two medical marijuana recommendations were discovered: for Morgan Lang, who was detained at the house, and a "Carla Obregon."

Police searched the house on Scottsdale Drive and found a man named Kenneth Rickett and 347 marijuana plants, along with the supplies for a growing operation. Rickett claimed ownership of the operation and said he had terminated his marijuana cultivation relationship with appellant four weeks earlier. A medical marijuana recommendation in the name of Carla Obregon was also found at the Scottsdale Drive house.

Text messages consistent with drug sales (referring to psilocybin mushrooms) were found on appellant's cell phone. Appellant had told Detective Tan he had a small bag of psilocybin mushrooms in his van, although none were found by the police.

In a criminal complaint filed October 1, 2010 (case No. FCR279712), appellant was charged with possession for sale of marijuana (§ 11359), cultivation of marijuana

(§ 11358) and possession of cocaine (§ 11350, subd. (a)), with allegations he had served two prior prison terms (Pen. Code, § 667.5, subd. (b)).[2] Appellant was released on bail.

B. *November 9, 2012, Search of Defendant's Home*

On November 1, 2012, Detective Tan went to defendant's home on Vail Court after receiving a complaint of possible marijuana cultivation. Tan smelled a strong odor of fresh marijuana near the home and, when he returned the following day, heard sounds consistent with the type of ventilation system used for indoor marijuana grows.

Tan obtained a search warrant, which was served on November 9, 2012. During the search, officers found evidence of recent marijuana cultivation in the garage: ten 1000-watt grow lights and 10 light ballasts, oscillating fans, a CO_2 generator, a ventilation system, a water pump and the remnants of two marijuana plants. Two marijuana recommendations were found in the garage area, one of which belonged to appellant. The garage had a whiteboard calendar with "handwritten numbers[] 1 through 10" on it, which was consistent with most indoor marijuana growing cycles. In the kitchen of the house were two bags of processed marijuana, one of which weighed 90 grams, along with two digital scales with marijuana residue. On the counter were heat-sealing plastic bags of a type often used to package marijuana. A cell phone belonging to appellant received a text message during the search that "said something about somebody asking if he had a 40 and if he would leave it in a can." A receipt in the dining room dated July 1, 2010, memorialized the sale of a pound of marijuana to the Greenwell Collective in Vallejo for $3,000. A plastic container of methamphetamine was found in a kitchen cabinet.

A power diversion unit, used to avoid paying for electricity, was found in appellant's home. A representative from PG&E determined the loss to that utility to be over $20,000.

[2] Several codefendants were also charged with these and other offenses. The resolution of their cases is not before us in this appeal.

On November 29, 2012, a felony complaint (case No. FCR297248) was filed charging appellant with possession of methamphetamine (§ 11378), cultivation of marijuana (§ 11358), possessing marijuana for sale (§ 11359) and theft of utility services in excess of $400 (Pen. Code, § 498, subd. (b)), along with allegations that appellant had served two prior prison terms and had committed the crimes while released on bail or on his own recognizance in the 2010 case (Pen. Code, §§ 667.5, subd. (b), 12022.1).

C. *Trial on Consolidated Cases*

In an information filed February 18, 2014, the charges arising in 2012 were consolidated with the charges filed against appellant in 2010. The prosecution presented the testimony of Detective Tan, who qualified as an expert in the identification of marijuana cultivation and possession of marijuana for sale.

Tan opined that appellant had possessed for sale the marijuana found in his van on September 29, 2010, based on the following factors: Kittell's statement about appellant wanting to sell him marijuana; the large amount of cash appellant was carrying that day ($1,500 in his pocket and another $725 in the van); the presence of pay-owe sheets in the van, with references to "1500" and "750"; the cash found the same day at two locations in appellant's home; the evidence of marijuana cultivation at appellant's home and the Scottsdale Drive residence; the receipt for the sale of $3,000 worth of marijuana to the Greenwell Collective in July 2010; and the amount possessed by appellant, which was not consistent with personal use. Tan noted that even heavy marijuana users do not carry around a pound of marijuana for personal use because it would go bad before you could smoke it all and it would be difficult to afford such a large quantity. Based on his conversations with marijuana users, Tan estimated that a heavy marijuana user who was smoking all the time and not sleeping would probably take a year to go through a pound and a half of marijuana.[3] Tan believed the cultivation operation discovered in 2010 was

[3] Tan acknowledged that one of the physicians who wrote a recommendation for appellant had recommended an amount of about three pounds.

not consistent with personal use due to the number of plants, the potential yield, and the cost of the equipment and supplies associated with the operation.

With respect to the search of appellant's home on November 9, 2012, Tan opined that the marijuana found in the kitchen was possessed for purposes of sale due to its large amount, the presence of residue on the nearby scale, the presence of packaging material, and the text message suggesting a drug sale, which was sent to appellant's cell phone during the search.

Appellant, who acknowledged having four prior felony convictions involving crimes of moral turpitude, testified at trial. He explained that he obtained his first physician's recommendation for medical marijuana in 2009 to alleviate chronic back pain caused by a fall from a ladder. Appellant subsequently obtained recommendations from different doctors in 2010, 2011 and 2012. In 2010, appellant smoked between one to two ounces of marijuana per week and was under the influence during his waking hours. Because he could not afford to purchase so much marijuana, he decided to grow his own and entered into an agreement with six to ten other medical marijuana patients for this purpose. They formed the "Good Health Solano Collective" and signed paperwork that included the directive "I will not divert medical cannabis for nonmedical purposes, nor will I offer to give, sell or otherwise distribute any medical marijuana received from this collective to any nonmember." They did not attempt to incorporate the Good Health collective under the laws of California.

In 2010, appellant and some of the Good Health members grew marijuana at defendant's home on Vail Court, while the rest of the group grew marijuana at the Callen Street storage facility. They planned to split the marijuana evenly, and if it exceeded the amount needed for their personal needs, agreed that they could sell the extra amount to offset growing costs. The equipment at Callen Street cost nearly $10,000.

According to appellant, the marijuana grows in 2010 were not sufficient to supply the amount needed by the Good Health cooperative members. Appellant kept handwritten records of each member's contribution to the collective, but he no longer had those records. In July 2010, he sold a pound of marijuana to the Greenwell Collective for

$3,000 to offset the costs of setting up the grow for the Good Health collective. He had been on the lease at the Scottsdale Drive house where a growing operation was discovered, but he was no longer associated with that house because he had a falling out with Kenneth Rickett.

As for the marijuana discovered in his van on September 29, 2010, appellant explained it had been given to him by a woman in Grass Valley whom he had assisted in setting up an outdoor marijuana grow. He intended to smoke it himself. The woman who gave him the marijuana was a qualified medical marijuana patient, though she was not a member of the Good Health collective. The money in the van belonged to the woman in Grass Valley, who had asked appellant to deliver it to someone else for her. Appellant claimed the notebooks with pay-owe sheets and the marijuana growing supplies belonged to an acquaintance named "Billy," who had borrowed his van while appellant was away in Utah. The cocaine discovered in the van did not belong to appellant and he did not know it was there until the police seized it. The $1,500 appellant was carrying in his pocket was from a loan repayment.

Appellant testified he did not sell marijuana to Kittell on September 29, 2010, but he did smoke some with Kittell inside the house. He acknowledged he might have provided at least a portion of the marijuana Kittell and the others smoked that evening. He sent text messages on his cell phone to people offering them psilocybin mushrooms, but claimed he was only going to sell them for what they had cost him to obtain. Appellant also acknowledged a text message exchange in which the sender asked, "Do you have trees to get rid of? I have cash," and appellant responded, "Yes, I do." Appellant stated the term "trees" referred to a live marijuana plant, though Detective Tan testified that it referred to processed marijuana.

Turning to the charges from 2012, appellant testified he had grown 10 plants of marijuana in his home for himself and two other qualified patients, though the three of them did not have a signed collective agreement. The yield from this grow, to which they all contributed labor, materials or money, was two and a half pounds. Appellant, an electrician, admitted that a power diversion unit was present in his home, but denied

placing it there himself. He testified that it had been installed by Billy, but acknowledged that he knew what Billy was doing and "didn't say no." Appellant never made a profit from selling marijuana and had to file for bankruptcy in 2013.

D. *Verdict and Sentence*

The court instructed the jury on the CUA and the MMPA as defenses to the charges of cultivating marijuana and possessing it for sale. The jury found appellant guilty of possession for sale of marijuana, cultivation and cocaine possession in 2010, as well as the cultivation and utility theft charges from 2012. (§§ 11350, subd. (a), 11358, 11359, 11379; Pen. Code, § 498, subd. (d).) Appellant was acquitted of possessing marijuana for sale and possessing methamphetamine in 2012. He admitted the on-bail and prison prior allegations.

The court denied probation and sentenced appellant to an aggregate term of seven years four months, calculated as follows: the two-year midterm for possessing marijuana for sale in 2010; consecutive eight-month terms (one-third the middle term) for possessing cocaine in 2010 and cultivating marijuana in 2012, one year each for the two prior prison term enhancements, and two years for the on-bail enhancement. The terms on the cultivation count from 2010 and the utility theft count from 2012 were ordered to run concurrently. Pursuant to Penal Code section 1170, subdivision (h), the court ordered appellant to serve three years of his term in county jail, and the remaining period on mandatory supervision.

DISCUSSION

Appellant argues his convictions for cultivating and possessing marijuana for sale must be reversed because (1) no rational trier of fact could have rejected his defenses under the CUA and the MMPA, (2) the testimony of the prosecution's expert witness on the sale and distribution of marijuana was insufficient to show the marijuana in this case was diverted for nonmedical purposes, and (3) the jury instruction defining a marijuana collective for purposes of the MMPA was misleading and altered the burden of proof by

effectively requiring appellant to prove the existence of a medical marijuana collective. We reject each claim.

A. *Law Governing Medical Marijuana Defense*

The CUA was enacted by California voters in 1996 and is designed to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes." (§ 11362.5, subd. (b)(1)(A).) It provides that the criminal statutes proscribing marijuana possession and cultivation do not apply to patients who possess or cultivate marijuana for their personal medical purposes upon a doctor's written or oral recommendation or approval: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d); see *People v. Kelly* (2010) 47 Cal.4th 1008, 1012 (*Kelly*).) The "medical purposes" requirement has been judicially construed to mean " 'the quantity possessed by the patient . . . , and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs." (*Kelly*, at p. 1013.)

The CUA encourages the federal and state governments "to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (§ 11362.5, subd. (b)(1)(C).) In response to this directive, the California Legislature enacted the MMPA in 2003, which is designed to " ' "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." ' " (*People v. Orlosky* (2015) 233 Cal.App.4th 257, 267 (*Orlosky*).) Under the MMPA, "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be

subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (§ 11362.775.)

"Although section 11362.775 clearly provides for collective cultivation, it does not specify what the Legislature meant by an association of persons who engage in collective or cooperative cultivation for medical purposes. For example, there is no mention of formality requirements, permissible numbers of persons, acceptable financial arrangements, or distribution limitations." (*Orlosky*, *supra*, 233 Cal.App.4th at pp. 267-268.) Courts have considered the parameters of collective endeavors under the MMPA, concluding that both large scale and smaller operations may qualify so long as the enterprise operates on a nonprofit basis and in a manner consistent with medical purposes. (See *Orlosky*, at pp. 268, 271-272; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 (*Jackson*); *People v. Colvin* (2012) 203 Cal.App.4th 1029, 1036-1037 (*Colvin*).) The size of an operation and its relative formality (or lack thereof) are factors the courts have considered when determining whether an operation falls within the MMPA, though these factors are not dispositive. (*Orlosky*, at p. 268; *Jackson*, at pp. 529-530.)

The California Attorney General has also promulgated Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (August 2008) (A.G. Guidelines) that look to such factors as limiting the purchase, sale and distribution transactions to persons who are qualified patients and members of the cooperative, limiting monetary reimbursements from members to amounts necessary for operating and overhead costs, and documenting each member's contribution to the enterprise. (A.G. Guidelines, <http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuana guidelines.pdf> [as of June 9, 2015]; *Orlosky*, *supra*, 233 Cal.App.4th at p. 268, fn. 6.) These guidelines, while not binding, have been given considerable weight by the courts when determining whether an operation qualifies as a collective under the MMPA. (*Colvin*, *supra*, 203 Cal.App.4th at p. 1040, fn. 11; *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 748; *People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1011.)

A defendant may defend against a charge of cultivating or possessing marijuana on the ground that those laws do not apply because he or she is a qualified patient under the CUA and the MMPA. (*People v. Mower* (2002) 28 Cal.4th 457, 477-481 (*Mower*).) The burden of proof as to the facts underlying these defenses is allocated to the defendant, but proof by a preponderance of the evidence is not required and this burden is met when the defendant simply raises a reasonable doubt as to those facts. (*Id.* at pp. 478-481; *People v. Solis* (2013) 217 Cal.App.4th 51, 58 (*Solis*); *Jackson*, *supra*, 210 Cal.App.4th at p. 533; *People v. Frazier* (2005) 128 Cal.App.4th 807, 816-821 (*Frazier*).)

B. *Sufficiency of the Evidence*

Appellant argues his convictions for cultivation and possession for sale must be reversed because no rational trier of fact could have concluded he intended to sell marijuana, to divert it to nonmedical purposes, or to profit from its cultivation, possession or distribution. We disagree.

Appellant's claim that his activities were protected under the CUA and the MMPA is a challenge to the sufficiency of the evidence that he acted unlawfully when he possessed and cultivated marijuana. (*Mower*, *supra*, 28 Cal.4th at p. 482; *Frazier*, *supra*, 128 Cal.App.4th at pp. 817-818.) Accordingly, " 'we review the entire record in the light most favorable to the prosecution 'to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] In applying this test, we do not resolve credibility issues or evidentiary conflicts. Instead, we presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict.' [Citation.]" (*Solis*, *supra*, 217 Cal.App.4th at pp. 56-57.)

Appellant was convicted of both cultivating marijuana and possessing it for sale on September 29, 2010. The evidence showed that as of that date, he was overseeing a growing operation involving over 200 marijuana plants in at least two separate locations,

which involved a considerable investment in equipment and materials. He had recently sold $3,000 of marijuana to a collective to which he did not belong, and was carrying over a pound of marijuana in his van when he was stopped by police after leaving the home of Daniel Kittell. Appellant told Detective Tan he was carrying psilocybin mushrooms in his van, and acknowledged that he was going to sell the mushrooms to other people for what they had cost him. Appellant was also carrying a relatively large amount of cash in his van and in his pockets ($2,225 total), and pay-owe sheets, which were consistent with drug sales.

Detective Tan, who qualified as an expert on the identification of marijuana cultivation and the possession of marijuana for sale, was of the opinion that the marijuana cultivated and possessed by appellant on September 29, 2010, was held for the purpose of drug sales. In support of this opinion, Tan cited the large quantity of marijuana appellant was carrying in his van; the number of marijuana plants under cultivation; the relatively large amount of cash appellant had on hand; the presence of notebooks containing pay-owe sheets; appellant's admission he was planning to provide mushrooms to other individuals in exchange for money (even if it was purportedly limited to his "cost"); and Kittel's statement that appellant wanted to sell him marijuana. The jury was not required to accept appellant's testimony that the marijuana he grew and possessed was solely for the medical use of himself and other members of a collective to which he belonged.

Significantly, a defense under the CUA requires that a defendant possess or cultivate marijuana "for his or her personal medical purposes pursuant to a recommendation by a doctor." (*People v. Windus* (2008) 165 Cal.App.4th 634, 642.) The maximum amount of marijuana that may be possessed is that which is reasonably related to the medical needs of the patient. (*People v. Mitchell* (2014) 225 Cal.App.4th 1189, 1204-1205; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549 (*Trippet*).) Although the evidence showed appellant possessed a medical marijuana recommendation, evidence was lacking as to how much marijuana was reasonably related to his back pain. He testified that he smoked three to four marijuana cigarettes a day, that a pound of marijuana would have lasted him three to four months, and that he was

constantly under the influence of marijuana, but he offered no testimony by a medical expert as to whether his use was reasonably related to his pain management. (See *Littlefield v. County of Humboldt* (2013) 218 Cal.App.4th 243, 256; *Trippet*, at p. 1549 [patient's current medical needs under CUA is factual question for the trier of fact].)

As for appellant's claim that he possessed and cultivated marijuana in association with other qualified patients under the MMPA, substantial evidence supports the jury's conclusion to the contrary. No other member of the Good Health collective came forward, and Detective Tan, the prosecution's expert, testified that recommendations such as those found at the grow sites were often fraudulent. In this particular case, two recommendations in the name of a single patient—Carla Obregon—were found at both appellant's home on Vail Court and the Scottsdale Drive address, casting doubt on the authenticity of those recommendations. The relative informality of the collective, its failure to incorporate under state law, the sale of marijuana to persons outside the collective, and appellant's acquisition of marijuana from outside the collective all militated against a finding that the marijuana was grown under the auspices of the MMPA, even if none of the factors was individually dispositive. Certainly, it cannot be said that *no* rational trier of fact could have concluded appellant was possessing and cultivating marijuana to sell to outside sources.

With respect to the cultivation conviction arising from appellant's arrest in 2012, the evidence supported the inference that appellant was operating a relatively large growing operation at his house. Although he claimed to have been acting collectively with two other medical marijuana patients, they had not signed any agreement to become a collective and the degree of informality was even greater than the purported 2010 collective. Given appellant's conduct in 2010, it was not unreasonable for the jury to conclude the marijuana grown in 2012 was for the purpose of sale and was outside the protection of the CUA and the MMPA.

C. *Sufficiency of Expert Testimony*

In a related vein, appellant argues that the expert testimony of Detective Tan did not establish that the marijuana at issue was possessed and cultivated for sale, rather than for permissible medical purposes. He complains that Tan "disregarded" and "second-guessed" the physicians' recommendations for medical marijuana and was skeptical of medical marijuana in general. Appellant notes that the process of growing marijuana for medicinal purposes may be the same as growing it for profit, and he suggests Tan "ignored large swathes of exculpatory evidence, misapplied legal standards, and intentionally injected prejudicial material to persuade the jury to adopt his biased viewpoint."

The short answer to appellant's attack on Tan's testimony is that it was up to the jury to determine the credibility of a witness, and we may not reject testimony believed by the jury unless it is physically impossible or obviously false. (*People v. Friend* (2009) 47 Cal.4th 1, 41.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403, overruled in part by *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) Nothing in Tan's testimony was physically impossible or obviously false. He was thoroughly cross-examined at trial about the issues now raised by appellant; that the jury found his testimony to be credible notwithstanding the points made by the defense is not a ground for reversing the judgment. The jury was not required to credit appellant's explanation of his marijuana possession over Tan's expert opinion. (See *People v. Dowl* (2013) 57 Cal.4th 1079, 1082.)

D. *Special Jury Instruction*

Appellant argues that his convictions for cultivation and possession for sale must be reversed because the trial court gave a legally erroneous special jury instruction regarding his affirmative defenses under the CUA and the MMPA. The challenged

instruction (Special Instruction No. 3) read as follows: "[¶] If you find that the defendant is a qualified patient, you cannot convict the defendant for Cultivating Marijuana or Possessing Marijuana for Sale based solely on an association with other qualified patients to collectively or cooperatively cultivate marijuana for medical purposes, if you find such a collective or cooperative exists. [¶] A cooperative or collective is an organization that provides services or goods primarily for its members. [¶] A cooperative or collective, or any of its constituent members, cannot profit from the sale or distribution of marijuana. [¶] The marijuana cultivated by a cooperative or collective must be cultivated for the medical purposes of the members of the organization. [¶] In determining whether an organization is a collective or cooperative you may consider anything that tends to prove or disprove its existence. You may also consider the following factors:

"1. Did the organization file articles of incorporation with the state?

"2. Did the organization register as a corporation under the Corporations or Food and Agriculture Code?

"3. Did the organization have rules on organization, articles, elections and distribution of earnings?

"4. Did the organization maintain financial and membership records?

"5. Did the organization document each member's contribution of labor, resources or money to the enterprise?

"6. Did the organization acquire marijuana only from that grown by members?

"7. Have all the individuals in the organization agreed not to distribute marijuana to non-members?

"8. Have all individuals in the organization agreed not to use marijuana for other than medical purposes?

"There is no requirement that a person obtain an identification card in order to claim the protections of the Compassionate Use Act. [¶] A qualified patient is a person who has obtained a recommendation from a physician for the use of marijuana for medical purposes."

Appellant does not challenge the first paragraph or the last two paragraphs of the special instruction, but argues that the remaining paragraphs were misleading because they suggest the factors affecting whether he was acting as a member of a collective under the MMPA were legal requirements, thus turning the burden of proof "on its head." We disagree.[4]

"In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights. [Citations.] We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation, and we presume jurors can understand and correlate all instructions given. [Citations.]" (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.)

The trial court did not tell the jury the factors enumerated in the special instruction were prerequisites to a lawful collective under the MMPA. Rather, the court advised the jury it "may consider" the factors, which were derived from case law and the A.G. Guidelines. There was no error in allowing the jury to consider factors relevant to the question of whether a lawful cooperative exists. (See *Colvin*, *supra*, 203 Cal.App.4th at p. 1038; *Jackson*, *supra*, 210 Cal.App.4th at p. 539 [collective must be nonprofit and a jury may consider the formality of the organization, the presence or absence of financial records, the processes by which an enterprise is accountable to its members, the size of the membership and the volume of business it conducts].)

Nor do we agree the special instruction misstated the burden of proof by requiring appellant to prove the factors establishing a lawful collective under the MMPA. As previously noted, a defendant has the burden of raising a reasonable doubt as to the facts

[4] Although appellant did not object to the special instruction, we review the alleged error under Penal Code section 1259, which allows an appellate court to "review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (See *People v. Johnson* (2015) 60 Cal.4th 966, 993.)

pertaining to a defense under the MMPA. (*Mower*, *supra*, 28 Cal.4th at pp. 478-481.) The California Supreme Court has not yet determined whether this burden is a burden of production under Evidence Code section 110 or a burden of persuasion under Evidence Code section 115. (*People v. Mentch* (2008) 45 Cal.4th 274, 292, fn. 12.) The special instruction did not mention the burden of proof, but the jury in this case was instructed with CALCRIM No. 2370, which is premised on the burden being one of production only and contains the following language: "The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime." In light of this clear directive, which was not contradicted by anything else in the instructions, it is not reasonably likely the jury assigned the burden of proving the existence of a lawful collective to appellant.[5]

DISPOSITION

The judgment is affirmed.

[5] In contrast, the court in *Frazier*, *supra*, 128 Cal.App.4th at pages 816-821, approved CALJIC No. 12.24.1 (2003 rev.), which is premised on the burden of proof being one of persuasion and provides in relevant part: "To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt of the unlawful possession, cultivation or transportation of marijuana."

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.